



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 436 OF 2003

CERES ESTATES LIMITED (IN RECEIVERSHIP).....PLAINTIFF

VERSUS

KIERAN DAY.....1ST DEFENDANT

LAWRENCE NGAMAU.....2ND DEFENDANT

NDUNGU GITHINJI3RD DEFENDANT

NATIONAL BANK OF KENYA LIMITED.....4TH DEFENDANT

INTERNATIONAL FINANCE CORPORATION LTD.....5TH DEFENDANT

RULING

1. On 26th January 2012, the suit herein was dismissed pursuant to a Notice to Show Cause under Order 17 Rule 2 of the Civil Procedure Rules for want of prosecution. By a Notice of Motion application dated 9th July 2013 the Plaintiff sought to reinstate the suit. That application was heard and determined on its merits by Hon. Justice George Kimondo, who dismissed the same on 5th November 2013 for lack of merit.

2. The current application is a Notice of Motion dated 30th July 2014 which seeks to review and or set aside the aforesaid order of dismissal of 26th January 2012. The application for review is founded on the strength that there was a discovery of new and important matter of evidence which was not within the knowledge of the Plaintiff or could not be produced by the Plaintiff at the time when the decree was passed and order made, and that there was a mistake or error apparent on the face of the record and that there is sufficient reason for review. Upon the said order being reviewed, the Applicant prays that the parties be ordered to comply with order 11 of the Civil Procedure Rules in readiness for trial. The Plaintiff/Applicant also seeks the leave to amend the plaint as proposed in the draft further amended plaint.

3. The application is premised on the grounds set out therein, and is supported by affidavit of **KENNETH PARTICK MALCORN DOWSON** sworn on 30th July 2014.

4. The Applicant's case is that the Judge erred in dismissing the suit suo motto despite an application for adjournment by the Plaintiff's counsel for time appear in court to Show Cause why the suit should not be dismissed for want of prosecution on 8.2.2012, even though the Defendant's counsel had not appeared in court on 26.1.2012 to oppose the application for adjournment. The grounds upon which the application is based has cited several alleged 'errors' on the part of the judge, including the use of improper language that the Judge erred in importing into the application his own conjectures , hypotheses, presumptions, assumptions, and/or suppositions, and was influenced by his own view in dismissing the suit.

5. The application is opposed by the 4th Defendant vide Replying Affidavit sworn by **SAMUEL WANJOHI MUNDIA** on 15th November 2014. The Respondent opposes the application on the grounds that the same is materially similar to the Notice of Motion dated 9th July 2013 referred to above which was dismissed by Hon. Justice Kimondo on 5th November 2013.

6. Parties filed submissions which were highlighted in court. I have carefully considered the application and submissions. In my view, the following is the only issue to be considered for determination;

- Whether this is a case for review or for appeal.

7. Under Order 45 of the CPR, an Applicant has the right to come to court for an order of review where new evidence has emerged which were not available before the decision was made. Under that order, there must be new evidence upon the discovery of which the Applicant immediately took steps to come to court without any delay. To address the issue of new and important evidence I have carefully noted that the application both in its grounds and the supporting affidavit and in the submissions of the Applicant has cited several 'errors' attributed to the judge. Most of these alleged errors, if they are errors at all, are errors of law. That means that they cannot form the grounds for review as they go to the root of the legality of the process. The other alleged error is that had the Judge known that there were stay of proceedings pursuant to the Civil Appeal No.2 of 2007, the court could have noted that indeed the delay in prosecution of the matter was only for two months, that is, between 25th November 2011 when the Appellate decision was made, and 26th January 2012 when the suit herein was dismissed. This submission is correct to the extent that indeed the delay was only for two months. However, the court was pretty aware of this fact. The judge stated in his ruling of 5th November 2013 at page 5 thereof as follows:

"...The joinder led to this Appeal in Civil Appeal No.2 of 2007...judgement was delivered on 25th November 2011...."

Clearly the Judge was aware of the stay. But if he was not, the Judge provided several reasons in the said ruling as to why the suit merited dismissal. So, in my view, there are no new evidence which has become available to found a cause for review.

8. The other condition for review is that upon discovery of new evidence, the party seeking a review should come to court without undue delay. The suit was dismissed on 26th January 2012. However, the current application is filed in July 2014. That is more than 2 ½ years after the dismissal. This delay has not been sufficiently explained.

9. However, it is easy to understand that the Plaintiff never sought for any review orders since the Plaintiff had instead through its application dated 9th July 2013 moved the court seeking the following orders;

"That the orders issued by this Honourable court on 26th January 2012 dismissing the suit for want of prosecution be set aside...and the suit be reinstated and proceed to hearing".

10. As I have noted earlier, that application was fully considered by the Judge on its merit and was

dismissed. In fact, the Judge identified several reasons why the application lacked merit and why the suit herein must stay dismissed. The findings by the judge were based on the facts and the law. The only remedy for an aggrieved party was to appeal the same. In fact, the Plaintiff/Applicant stood a better chance appealing the said ruling, than belatedly filing the current application for review. I appreciate that there was no application for review before Hon. Justice Kimondo vide the aforesaid application. However, the application for review before this court is not merited as it only identifies possible grounds for appeal.

11. Finally, Hon. Justice Kimondo in the aforesaid application also considered the prayer for amendment of the plaint, and after observing that the draft amendment was not attached, dismissed the same. However, the Judge having found good reasons to dismiss the application for the reinstatement of the suit, found no reasons to allow the proposed amendment. I too find no reasons to allow the proposed amendment to the Plaint, having found no merit in the current application for review.

12. The upshot of the foregoing is that the Plaintiff's Notice of Motion application dated 30th July 2014 is dismissed for want of merit. Costs shall be for the Respondent herein.

Orders accordingly.

READ, DELIVERED AND DATED AT NAIROBI THIS 4th DAY OF DECEMBER 2015.

E. K. O. OGOLA

JUDGE

PRESENT:

Mr. Gaturu for the Plaintiff/Applicant

Mr. Odhiambo for the Defendant/Respondent

Teresia - Court Clerk